3059.

SUPREME COURT OF THE UNITED STATES.

No. 86.

FITZ HENRY HOMER, PLAINTIFF IN ERROR,

vs.

GEORGE L. BROWN.

IN ERROR TO THE CIRCUIT COURT UNITED STATES, FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	2	1
Declaration	5	2
Motion to quash writ	8	3
Motion disallowed	9	3
Motion for leave to file pleas	9	4
Defendant's pleas	10	4
Motion for leave to amend pleas	15	6
Amended pleas	16	6
Replication to defendant's pleas	18	7
Issue joined	19	7
Verdict of jury	19	7
Judgment	21	8
Bill of exceptions	21	8
Certificate of clerk	56	19

GIDEON, print.

3060.

UNITED STATES, *ss.*

[L. S.] The President of the United States, to the judges of the circuit court, holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between George L. Brown, a citizen of the State of Vermont, resident of the town of Berlin, in the county of Washington, in said last-named State, yeoman, demandant, and Fitz Henry Homer, a citizen of Massachusetts, resident of the city of Boston, in the county of Suffolk, in said State, gentleman, tenant, in a plea of land, a manifest error has intervened, to the great damage of the said Fitz Henry Homer, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court, at Washington aforesaid, this fifth day of February, in the year of our Lord one thousand eight hundred and fifty-three, and of the independence of the United States the seventy-seventh.

H. M. FULLER, *Clerk.*

Allowed by P. SPRAGUE,
District judge.

UNITED STATES OF AMERICA, *ss.*
First circuit, district of Massachusetts.

To George L. Brown, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the first circuit and the district of Massachusetts, wherein Fitz Henry Homer is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not

be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Peleg Sprague, judge of the district court of the United States, for the district of Massachusetts, this sixteenth day of March, in the year of our Lord 1853.

P. SPRAGUE, *Judge*.

BOSTON, *March 16th*, 1853.

UNITED STATES OF AMERICA,
Massachusetts district, ss.

Pursuant hereunto, I have cited the within-named Brown to appear as within commanded, by giving in hand to N. T. Dow, esq., the attorney of record of the said Brown, a true and attested copy hereof.

Service, $2 06
Copy, 1 00
$3 06

J. H. RILEY,
Dep. U. S. marshal, Mass. dist.

UNITED STATES OF AMERICA,
Massachusetts district, ss.

At a circuit court of the United States, for the first circuit and district of Massachusetts, begun and holden at Boston, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-two—

Before the honorable Benjamin R. Curtis, associate justice; honorable Peleg Sprague, district judge.

GEORGE L. BROWN, a citizen of the State of Vermont, resident of the town of Berlin, in the county of Washington, in said last-named State, yeoman, demandant,

vs.

FITZ HENRY HOMER, a citizen of Massachusetts, resident of the city of Boston, in the county of Suffolk, in said State, gentleman, tenant.

In a plea of land, wherein the said George L. demands against the said Fitz Henry Homer an undivided moiety, exceeding in value five hundred dollars, of a certain piece of land, with the appurtenances, situate within the limits of the city of Boston, in the county of Suffolk, and State of Massachusetts, containing one-fifth of an acre, and bounded and described as follows: Beginning at a point on the line formed by the outer edges of the southerly walls of the row of buildings now standing on the north side of that open space within the limits of said city of Boston which is called Clinton street; which point is ninety feet and six inches easterly from the southwesterly corner of the brick building now standing on the northerly side of said open space, and on the easterly side of that other open space within the limits of said city called Merchants' row, and running northerly from said point in a

straight line, forming a right angle with said first-named line thirty-seven feet to a point; thence, turning at an angle of fifty degrees, and running southeasterly in a straight line two hundred and thirty-four feet, to a point in that other open space within the limits of said city, now called North Market street; thence, turning at an angle of forty degrees, and running westerly in said last-named open space in a straight line eighty-nine feet, to a point therein; thence, turning at a right angle, and running in a straight line northerly thirty-one feet and six inches, to a point on land now covered by a building standing on the northerly side of said last-named open space, and designated on the southernmost front thereof by the arithmetical numbers 29 and 30; thence, turning and running northwesterly in a straight line to the point of beginning; being the same land, with the appurtenances, described in the deed of Edward Stoddard and Sally Stoddard to William Brown, dated July 28th, 1803, recorded in the registry of deeds for said county of Suffolk, book 206, page 160, and contained, described, and mentioned in the deed of division tripartite of James Pitts, John Welch, Simeon Stoddard, and others, dated June 4th, 1764, recorded in said registry book 101, page 244; which undivided moiety aforesaid the demandant claims as his right and inheritance by our right of right. Whereupon the demandant saith that, within twenty years now last past, he was seised of the said undivided moiety in his demesne, as of fee and right, taking the profits thereof, to the value of fifty dollars by the year, and whereof he complains that the said Fitz Henry Homer unjustly deforces him, to the damage of the said demandant, as he says, the sum of twenty thousand dollars.

This action was entered at the May term of this court, A. D. 1851, when and where the parties appeared by their respective counsel; thence said cause was continued, from term to term, unto this present term; and on the first day of December, A. D. 1852, the tenant, by his attorney, filed the following motion to quash writ, viz:

Circuit court United States, Massachusetts district, October term, 1852.

George L. Brown vs. Milton Gale.
Josiah Brown vs. Same.
Same vs. Jesse Kingsbury.
George L. Brown vs. Same.
Same vs. City of Boston.
Josiah Brown vs. Same.
Same vs. Josiah D. Richards.
George L. Brown vs. Same.
Same vs. Fitz Henry Homer.
Josiah Brown vs. Same.

In all the above entitled actions the defendants move this honorable court to quash the writs of right, because writs of right were abolished by sect. 51, chap. 101, Revised Statutes of Massachusetts.

By P. W. CHANDLER,
Att'y of defendants.

Upon which the premises being seen and considered, and the parties heard thereon, the said motion was disallowed; and afterwards, on said first day of December, A. D. 1852, the following motion for leave to plead, &c., was filed, viz:

Circuit court United States, Massachusetts district, October term, 1852.

GEORGE L. BROWN
vs.
FITZ HENRY HOMER.

And now, the defendant in the above-named action, who is tenant of a part of the land demanded in the plaintiff's writ, comes, and, in addition to a joinder of the mise on the mere right with the demandant as to that part of the land of which the defendant is tenant, tenders the pleas of general non-tenure as to a part of the demanded premises, of special non-tenure as to the residue, and moves this honorable court for leave to file all the above-named pleas.

By P. W. CHANDLER,
Att'y of defendant.

Whereupon, upon consideration thereof, said motion was allowed; and afterwards, on said first day of December, A. D. 1852, the following pleas were filed, viz:

Circuit court United States, Massachusetts district, October term, 1852.

GEORGE L. BROWN
vs.
FITZ HENRY HOMER.

Joinder of the mise on the mere right, with plea of non-tenure.

And the said Homer comes and defends the right of the said Brown as to a parcel of the demanded premises, bounded and described as follows: Northerly, by Clinton street, sixteen feet; easterly, by the centre of a brick wall dividing the premises from land formerly of D. P. Parker, deceased, fifteen feet eight inches; southwesterly, by land formerly of Savage, now of said Homer, twenty-three feet; when, &c., and whatsoever else he ought to defend, and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, and puts himself upon the country, &c., and prays a recognition to be made whether he, the said Homer, has greater right or title to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as he now holds the same, or whether the said Brown, the demandant, has title to hold the same tenements, with the appurtenances, as he has above demanded the same, &c.

P. W. CHANDLER.

And the said Brown likewise, &c.

By DOW & PRINCE, *his att'ys.*

And as to all the residue of the land described in the writ aforesaid

of the said Brown, except a parcel bounded and described as follows: Southerly by the northerly wall of the stores on the northerly side of North Market street forty-five feet; northeasterly by the northeasterly line described in the writ sixty-three feet; northerly by the buildings standing on the northerly side of Clinton street forty-five feet, and southwesterly by the southwesterly boundary described in the writ sixty-three feet; the said Homer comes and defends his right when, &c., and says that the said Brown his aforesaid action thereof against him ought not to have, because he says that he is not, nor was at the time of suing forth the writ aforesaid of the said Brown, nor at any time since, tenant of the said messuage, with the appurtenances therein mentioned as of freehold, or possessed of any estate therein; and this he is ready to verify. Wherefore he prays judgment, if the said Brown his aforesaid action thereof against him ought to have, &c., as to the last-named parcel, bounded and described as follows: Southerly by the northerly wall of the stores on the northerly side of North Market street forty-five feet; northeasterly by the northeasterly line described in the writ sixty-three feet; northerly by the buildings standing on the northerly line of Clinton street forty-five, and southwesterly by the southwesterly boundary described in the writ, sixty-three feet. The said Homer comes and defends his right when, &c., and says that, as to the last-described parcel of land, the said Brown his aforesaid action thereof against him ought not to have, because he says that he is not, nor was at the time of suing forth the writ aforesaid of the said Brown, nor at any time since, tenant thereof as of freehold; but that the city of Boston, a corporation duly established, under and by virtue of the laws of Massachusetts, long before the suing forth of the said writ, to wit, on the first day of October, A. D. eighteen hundred and twenty-four, was seised of the tenements last aforesaid, with the appurtenances, in its demesne, as of fee, and being so thereof seised on the day last aforesaid, granted to Benjamin Parrott Homer, late of said Boston, a right of way as a public way or street over and upon said last-described parcel; to have and to hold to him, the said Benjamin P. Homer, his heirs and assigns, to his and their use forever; and upon the death of said Benj. P. Homer the said right of way descended, as appurtenant to the estate first above described, to the said Fitz Henry Homer; and long before the death of the said B. P. Homer the estate last above described was duly laid out by the public authorities as and for a public street or way.

By virtue whereof the said Fitz Henry Homer entered upon the last-described land, and became possessed of such estate therein as aforesaid, and had not, at the time of suing forth the said writ, nor at any time since, any estate therein but a right of way as aforesaid, the freehold thereof then, ever since, and still, being in the said city; and this he is ready to verify. Wherefore he prays judgment if the said Brown his aforesaid action thereof against him ought to have, &c.

And afterwards, at this term, to wit, on the twenty-first day of December, A. D. 1852, the following motion for leave to amend pleas was filed, viz:

United States of America, U. S. circuit court, Mass. dist., Oct. term, 1852.

GEO. L. BROWN
vs.
FITZ HENRY HOMER.

And now the said defendant moves this honorable court for leave to amend his pleas, in the above-entitled action, by striking out the pleas of the general issue and general non-tenure, as the same were filed in this case, and pleading, in their place, the annexed pleas of the general issue and general non-tenure.

By P. W. CHANDLER,
Att'y for def't.

Thereupon, on said twenty-first day of December, A. D. 1852, by leave of court, the following amended pleas were filed, viz:

Circuit court U. S., Mass. dist., Oct. term, 1852.

GEORGE L. BROWN
vs.
FITZ HENRY HOMER.

Joinder of the mise on the mere right, with pleas of non-tenure.

And the said Homer comes and defends the right of the said Brown and his seisin as to a parcel of the demanded premises bounded and described as follows: Northerly by Clinton street sixteen feet; easterly by the centre of a brick wall dividing the premises from land formerly of D. P. Parker, deceased, fifteen feet eight inches; southwesterly by land formerly of Savage, now of said Homer, twenty-three feet; when, &c., and puts himself upon the country, and prays a recognition to be made whether he, the said Homer, has greater right or title to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as tenants thereof, as he now holdeth them; or the said Brown, the demandant, to have the said tenements, with the appurtenances, as he has above demanded them. And the said Homer also prays that it may be inquired by the jury whether the said Brown was seised of the tenements aforesaid, with the appurtenances, in his demesne, as of fee, within twenty years next before the commencement of this action, as the said Brown has above, in his said count, alleged.

By P. W. CHANDLER, *his att'y.*

And the said Brown likewise, &c.

By DOW & PRINCE, *his att'ys.*

And as to all the residue of the land, described in the writ aforesaid, of the said Brown—except a parcel bounded and described as follows: southerly, by the northerly wall of the stores on the northerly side of North Market street, forty-five feet; northeasterly, by the northeasterly line described in the writ, sixty-three feet; northerly, by the

3063.

buildings standing on the northerly side of Clinton street, forty-five feet; and southwesterly, by the southwesterly boundary described in the writ, sixty-three feet—the said Homer comes and defends his right when, &c., and says that the said Brown his aforesaid action thereof against him ought not to have, because, he says, that he is not, nor was at the time of suing forth the writ aforesaid of the said Brown, nor at any time since, tenant of the said messuage, with the appurtenances therein mentioned, as of freehold or possessed of any estate therein, and this he is ready to verify; wherefore he prays judgment if the said Brown his aforesaid action as to the said residue, except as aforesaid, thereof against him ought to have, &c.

And afterwards, on said twenty-first day of December, A. D. 1852, the demandant aforesaid filed the following replication, viz:

Circuit court U. S., Mass. district, Oct. term, 1852.

GEORGE L. BROWN
vs.
FITZ HENRY HOMER.

Demandant's replication.

And the demandant says that, by reason of any thing above alleged, he ought not to be precluded from having his aforesaid action thereof against the said defendant, because, he says that at the time of suing forth the writ aforesaid of him the said demandant, the said defendant was tenant as of freehold, in manner and form as by said writ is above supposed, of all the residue of the demanded premises; and this he prays may be inquired of by the country.

By DOW & PRINCE, *his att'ys.*

And the said dft. likewise, &c.

By P. W. CHANDLER, *his att'y.*

Upon issue joined as aforesaid, said cause, after a full hearing, is committed to a jury sworn according to law to try the same, who, after hearing all matters and things concerning the same, return their verdict therein, that is to say:

Circuit court U. S., Mass. dist., Oct. term, 1852.

GEORGE L. BROWN
vs.
FITZ HENRY HOMER.

On the first issue, being the general issue, the jury find that the said George L. Brown hath more mere right to have an undivided moiety of so much of the demanded premises as is thus described: northerly, by Clinton street, sixteen feet; easterly, by the centre of a brick wall dividing the premises from land formerly of D. P. Parker, deceased, fifteen feet eight inches; southwesterly, by land formerly of Savage, now of said Homer, the defendant, twenty-three feet; with the appur-

tenances, to him and his heirs, as he hath above demanded the same, than the said Homer to hold the same as he now holds it, as the said Brown by his aforesaid writ hath above supposed; and that the demandant was seised of the same, as by him in his writ alleged.

On the second and third issues, being upon the pleas of general and special non-tenure, the jury find that the said Fitz Henry Homer was not at the date of the writ, has not been since, and is not now, seised as of freehold of any part of the land therein described, as the said Brown by his aforesaid writ hath above supposed.

LUKE FAY, *Foreman.*

Thereupon, it is considered by the court that the said George L. Brown recover his seisin against the said Fitz Henry Homer of one undivided moiety of so much of the demanded premises as is thus described, namely: northerly by Clinton street, sixteen feet; easterly by the centre of a brick wall dividing the premises from land formerly of D. P. Parker, deceased, fifteen feet eight inches; southwesterly by land formerly of Savage, now of said Homer, the defendant, twenty-three feet, with the appurtenances, to hold to him, the said George L. Brown, and his heirs, quit of the said Fitz Henry Homer and his heirs forever, together with his costs taxed at

And as to the residue of the demanded premises, that said Brown take nothing by his writ aforesaid.

Whereupon the tenant filed the following bill of exceptions, viz:

Bill of exceptions.

GEORGE L. BROWN, a citizen of the State of Vermont,
vs.
FITZ HENRY HOMER, a citizen of the State of Massachusetts.

Be it remembered, that at a term of the circuit court of the United States, for the first circuit, holden at Boston, within and for the district of Massachusetts, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-two, by the honorable Benjamin R. Curtis, esquire, associate justice of the Supreme Court of the United States, the honorable Peleg Sprague, esquire, judge of the district court of the United States for said district, came George L. Brown, of Berlin, in the county of Washington, and State of Vermont, who is a citizen of said State of Vermont, and in a plea of land declared against Fitz Henry Homer, a citizen of the State of Massachusetts, resident of the city of Boston, in the county of Suffolk, in said State, gentleman, as by the writ and declaration of record will appear; and the defendant, who was tenant of a parcel of the demanded premises, moved the honorable court to quash the writ in this case, which is a writ of right to recover land situated in Massachusetts, because writs of right were abolished by the Revised Statutes of Massachusetts, as will

of record appear; which motion was disallowed by the honorable court, and to this ruling the defendant excepted.

Thereupon the defendant joined the mise on the mere right as to a parcel of the demanded premises, and pleaded general non-tenure as to another parcel of the same, and special non-tenure as to the residue; and the demandant joined issue with the defendant on the mere right, and replied to the other pleas of general and special non-tenure, all which will of record appear. And thereupon the action came on for trial before the said circuit court, at the said October term, before a jury empanelled for that purpose. And it appeared at the trial in the facts admitted by the parties, or proved on the part of the demandant, as follows: that the land demanded in the plaintiff's writ is situated in part on the north side of North Market street, in Boston, and is part of the same mentioned in the will hereinafter recited of William Brown, late of said Boston, deceased, under which the demandant claims title as the estate which the testator purchased of one Mr. Stoddard.

The said William Brown died seised of the demanded premises in fee simple, leaving a will dated April twenty-sixth, eighteen hundred and fifteen, and a codicil thereto added, dated May thirtieth, eighteen hundred and sixteen, both of which were duly proved, approved, and allowed July fifteenth, eighteen hundred and sixteen, and are in the following words, terms, and figures, to wit:

In the name of God, amen. I, William Brown, born in Waltham, in the county of Middlesex, and Commonwealth of Massachusetts, but for nearly forty years have resided in Boston, being advanced in age, and in feeble health, but of sound, disposing mind and memory, do make, ordain, and declare this instrument to be my last will and testament, revoking all others. I commit my spirit to that gracious God who has been pleased to give me a rational existence, through the mediation of his only Son, who has communicated the blessed hope of a happy immortality. Imprimis, I give and bequeath to my eldest son, William Brown, junior, all my brick store situate and bounded on Broad street, and Doan street, in Boston, with the land thereto belonging, together with all the utensils and implements belonging to said store, and my several chests of small tools, he, the said William, to pay a consideration hereafter stated, for my son Samuel. Item. I give and bequeath to my eldest daughter, Sarah Brown, and to my second daughter, Zebiah C. Tilden, the present wife of Bryant P. Tilden, jointly and equally, my dwelling-house, situate on Orange street, in Boston, on the land which was the Old Fortification when I purchased the same, together with the land which I do hereby assign to belong to said dwelling-house, namely: beginning at the northerly bounds on Orange street, measuring in front, southerly, on said street, seventy-two feet; thence turning easterly towards the capsil and flats, there measuring one hundred and thirty feet from the front line of the house on said street; thence turning at right angles, there measuring seventy-two feet; thence turning westerly on the northerly bounds, there measuring one hundred and thirty feet to the first-mentioned boundary; that

is to say, the land or premises for said dwelling-house is seventy-two feet wide at each end, by one hundred and thirty feet deep on the southern and northern lines. The rent or improvement of said house and land is for the equal benefit of the said Sarah, and the said Zebiah, during their natural life, and the premises is to descend to their heirs: Provided, however, if public improvements which are now in contemplation should render it expedient to sell the said house and land, my executor hereafter named is hereby directed to vest the amount of the proceeds in the public funds, or in the stock of some approved bank in Boston, or in other real estate; the rent, interest, or dividends, to be paid in like manner equally to the said Sarah and Zebiah, and the principal to descend to their heirs.

And to my daughter, Sarah Brown, as some remuneration for her constant and unwearied attention to me through much sickness, I give and bequeath to her my three shares in the Boston South Bridge. Item: For my youngest child and son, Samuel Livermore Brown, who was born of my last wife, Elizabeth Livermore, I make the following arrangement of property in my estate for him: The property of my first wife has been in some measure mingled in common stock; the property which might otherwise have descended to me by my last wife, Elizabeth, was, after her decease, conveyed by her father, by deed, and by a brother, by will, to her only surviving child, (the said Samuel,) which was perfectly consistent with my approbation; and this property, being in land, is sufficient for several farms; and if the said Samuel should quit seafaring pursuits, which he has selected for his employment, and turn his attention to agricultural pursuits, he will not need any addition to his acres, but it may be necessary and convenient to have some annual income to aid him in his labor; therefore I give and bequeath to my son, Samuel L. Brown, the rent or improvement of my store and wharf privilege, situate on the northerly side of the town dock, in Boston; he to receive the rent annually or quarterly (if the same should be leased or let) during his natural life, and the premises to descend to his heirs; this being the estate I purchased of Mr. Stoddard—reference to the records will give the bounds. Also, I do hereby direct my son William to vest one thousand dollars in bank stock, or the stocks of this State or the United States, the interest of which, as it arises, to be paid by him to the said Samuel during his life, and the stock to descend to the heirs of the said Samuel. This is to be advanced by the said William as some consideration for the difference in the value of the two stores. Item: I hereby direct my son and co-partner in trade, William Brown, junior, to pay off all the company debts, without delay, after my decease, and then take to himself his full share of all the stock in trade, including cash on hand, book debts, and obligations due to the company or firm; and from the portion of stock, cash, book debts, [and] obligations which may then belong to my estate, together with a house lot in front of my dwelling house, and adjoining the estate or store belonging to Miss Hannah Brown, measuring something more than forty feet in

front on Orange street, and wider in the rear, the easterly line of which is to be in a straight line with the premises of the dwelling house as before described; also those several lots bounded by the new street leading to the bridge, being chiefly flats, which extend to the channel, with my ten shares in the Boston Bank, and twenty-seven shares in the Fire and Marine Insurance Office, together with my turnpike shares, and my shares in the bridge near Dartmouth College, and all other of my property not before or hereafter disposed of, as the same may be turned into money; first to pay all my private debts, which are separate from the company, and the residue, as it may be collected, is to be divided into four equal parts—one fourth part for William, one fourth part for Sarah, one fourth part for Zebiah, and one fourth part for Samuel. But I do hereby direct my executor, hereafter named, to vest one-half of the said Samuel's fourth part of this property in the stock of some approved bank in Boston, or in the stocks of this State or the United States, or in real estate; the dividend or rent to [be] paid by him to the said Samuel as it may arise, and the principal or premises to descend to his heirs; and the other half of this fourth part to be paid to the said Samuel in money, when collected, to stock his farm, or for other purposes. And for a correct understanding amongst the heirs concerned, I make the following statement and explanation, namely: The farm in Waltham, part of which lands descended to myself and to my only brother (Josiah Brown, deceased) from our ancestors, who had possessed the same for nearly one hundred years. In this I had a double share, according to the then existing laws of the Commonwealth, and which my father, at his decease, (who died intestate,) observed would remunerate me for five years' labor in his employ after I was twenty-one years of age. This extra share I relinquished verbally to my brother in his lifetime, without making any demand for my labor, placing the whole in common stock, and entered into a joint co-partnership with him in trade, which continued until his decease. My brother, by his will, assigned his half of the farm premises to my care and improvement during my life, provided I should be the survivor, with a desire in his will that the said farm, with our additions in land and buildings, might be held and owned by his eldest son, Josiah, and my eldest son, William, after my decease, they paying a just consideration to the other heirs, and the premises to remain in the possession of William and Josiah Brown, through which names they had descended.

But this desire is defeated by the death of my nephew, the said Josiah, who was lost at sea soon after the death of his father. In cultivating rough and barren lands on said farm, multiplying and enlarging the fields, improving and increasing the fruit, repairing the buildings, and adding to the stock, making many hundred rods of stone wall, laying an aqueduct, opening a new road, and ditching low lands, I have expended from my own funds about two thousand dollars more than I have received from the produce of said farm since the decease of my brother. Those improvements and expenditures,

with my extra share and demand for labor, I do hereby place in common with the farm premises, for the joint and equal benefit of my heirs hereafter named, and for the surviving children of my deceased brother, in manner hereafter stated, namely: I do hereby direct my executor, hereafter named, to pay from the produce of the whole farm to my friend, Jonas Brown, fifty dollars; to Robert Baldwin and his wife Patty, who have been long in my employ, one hundred dollars; to Mary Brown and Abigail Brown twenty dollars each. R. Baldwin and his wife to receive half their amount in farm stock, if they should prefer it. These small legacies are not presented them for their value, but as an expression of my friendship.

Item. To my eldest son, William Brown, jun., to my daughter Sarah Brown, and to my daughter Zebiah C. Tilden, I give and bequeath to them jointly, equally in common and undivided, one-half of the said Waltham farm, which includes a piece of fresh meadow in West Cambridge, and a piece of salt marsh in Watertown thereto belonging, together with half the live stock on said farm or thereto belonging, at my decease, and also one-half of the farming utensils and furniture; the other half of said farm, stock, utensils, and furniture, is for the heirs of my deceased brother, namely, John Clark Brown, Sarah Phipps Brown, the present wife of Thomas W. Storer, Miss Hannah Brown, and Miss Catharine Brown, on the following conditions: Whereas the said Storrow and Brown did, at the close of their apprenticeship, form and enter into a joint copartnership in trade and commerce, and did establish one store in Boston and one other store in Montreal, under their separate care, for joint, mutual, and equal benefit, and by the measures of the American Administration, preparatory to the present unhappy war with Great Britain, they were driven from business, and from the collection of large and numerous debts due them in the government of Canada; under this pressure and sudden embarrassment it became necessary for me to aid them by a loan of five thousand dollars, for which, as some security, they, with their wives, gave me a deed of their right in reversion of and in the Waltham farm, stock, and utensils. But it is my will, and I do hereby give and bequeath to my nephew John C. Brown, and to my niece, his sister, Sarah P. Storrow, the present wife of Thomas W. Storrow, the improvement of one-fourth part of said farm, stock, and utensils, in common and undivided during their life, but not the right to convey this improvement to any other person or persons beyond the present family heirs to said farm, as named in this section of my will; and if in their lifetime they do pay whatever may be due from them to my heirs or estate, their portion of the farm premises to descend to their heirs, unless they prefer and adopt a different arrangement, which is hereafter provided for. As my son Samuel is well provided for in land, I do not assign to him any part or portion of the Waltham farm, or the stock and utensils thereto belonging.

Item. I do hereby give, and I direct my executor herea named

to pay, one hundred dollars to the funds of the church in Hollis street, under the pastoral care of the Rev. Mr. Holley.

Item. My household furniture in Boston, or such as does not belong to the farm in Waltham, my globes, maps, and books, (except the twenty-one volumes of Encyclopedia, which belong one-half to my deceased brother's heirs,) are to be disposed of by my executor hereafter named for the equal benefit of my heirs, namely, William, Sarah, Zebiah, and Samuel, by division or sale, as to them shall be most agreeable; and my wearing apparel, such as my sons William and Samuel may not choose to divide and retain, I give to my friends Jonas Brown and Robert Baldwin. And I do hereby appoint my eldest son, William Brown, jun., sole executor of this my last will and testament.

And lastly, it is my desire that it may be understood by all the heirs concerned, that the farm property in Waltham is not to be considered as a source of wealth or income, but as a quiet retirement in sickness, or for shelter and fuel under the pressure of misfortune; and as a good agriculturalist must reside on the premises, that the lands may not be mutilated and disposed of to strangers by those heirs who have the right to sell, and may find it necessary so to do; but that they first offer the same to such other heirs as may be able and willing to purchase, the building being nearly new, and of a size and construction in proportion to the whole of said farm. Divisions and subdivisions will diminish the value to each heir; and if future prosperity should render it convenient and desirable for my nephew, John C. Brown, to assume his father's name, (Josiah,) and the other heirs should choose to sell and convey their right and interest in the premises to my son William and my said nephew, whereby my brother's will and desire, as far as possible, may be accomplished, no expression or bequest in this my will is to be so construed or understood as to interfere with or preclude such transfer and conveyance; and as all the other heirs are females, the value in money at interest for them will, no doubt, be more productive. And if a difference of opinion or dispute should arise amongst or between any of the heirs, in regard to the value of their right or interest in the said farm, it is my earnest request and desire that the same be referred to friends, or disinterested persons, to estimate and settle the same, that there may not be any litigation, expense, or appeals for division, in any established courts of law whatever, by which the happy existing harmony among the heirs may never be interrupted.

(Interlineations before signing: third page, or the stocks of this State or the United States; fourth page at the top, same words repeated, the word the between and and premises; third page, the word divided is erased and interest inserted below it.)

In testimony whereof I have hereunto set my hand and seal, this twenty-sixth day of April, in the year of our Lord one thousand eight hundred and fifteen.

WILLIAM BROWN. [L. S.]

Signed, sealed, delivered, published, and declared by the said William Brown to be his last will and testament, in presence of us, who, in presence of him, and of each other, have hereunto subscribed as witnesses.

NATHANIEL CURTIS,
HENRY B. CURTIS,
LUTHER PARKER.

Codicil to my foregoing will.

Whereas my son Samuel has sold his two farms which were left to him, one by his late grandfather Livermore, by deed, and the other by his uncle George Livermore, by will; and whereas it appears he has relinquished every intention to agricultural pursuits, and is now absent at sea with a view to qualify himself for a seafaring life, and, under these circumstances, considering it to be more for his interest and happiness, I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son Samuel therein named, and in lieu thereof do bequeath to my son, the said Samuel, only the income, interest, or rent of said real or personal estate, as the case may be, so that no more than the income, interest, or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go to the legal heirs.

In testimony whereof I have hereunto set my hand and seal at Waltham, in the county of Middlesex, this thirtieth day of May, in the year of our Lord one thousand eight hundred and sixteen.

WILLIAM BROWN, [L. S.]

Signed, sealed, delivered, published, and declared by the said William Brown as a codicil to his last will and testament hereunto annexed; done in presence of us, who, in presence of him and of each other, have hereunto subscribed as witnesses.

ISAAC SANDERSON,
LEVI METCALF,
ISAAC BALDWIN.

Samuel Livermore Brown, named in said will and codicil, was married November fourteenth, eighteen hundred and nineteen, and died January thirty-first, eighteen hundred and thirty-one, leaving the demandant and Josiah Brown his only children and heirs at law. George L. Brown, the demandant, was born February sixth, eighteen hundred and twenty-one; Josiah Brown was born January fifth, eighteen hundred and twenty-three.

So much of the estate described in the plaintiff's writ as is described in the plea of the general issue in this case exceeds four thousand dol-

3067

lars in value, and was, at the date of the writ and service, in possession of defendant claiming a fee simple.

The demandant, George L. Brown, is, and was at the date of his writ, a citizen of the State of Vermont, and made actual entry on the land demanded in his writ January twenty-ninth, eighteen hundred and fifty-one, claiming an undivided moiety thereof in fee simple against the defendant as in no way entitled to said land.

The demandant maintained, that under and by virtue of the said will and codicil of William Brown, he was entitled, at the death of his father, Samuel Livermore Brown, to one undivided moiety of the demanded premises in fee simple absolute.

On the part of the defendant, who is tenant of that part of the demanded premises described in his plea of the general issue, and claims a right of way as of a public way over so much of the demanded premises as is described in his plea of special non-tenure, it appeared that he claims title in fee simple to the first-named parcel, and his right of way as aforesaid through mesne conveyances under the quit-claim deeds of William Brown, Zebiah C. Tilden, Sally Brown, and the said Samuel Livermore Brown, dated May fifth, eighteen hundred and twenty-four, acknowledged, one May fifth, and the other May seventeenth, and both recorded June eighteenth of the same year, who were the only children and heirs at law of William Brown, the testator, at his decease; and he maintained that the aforesaid grantors were enabled, under and by virtue of the aforesaid will and codicil, to pass, and by the aforesaid deeds did pass, all the title to the demanded premises which the testator had at the time of his death.

It further appeared on the part of the defendant that the demandant in this action, with his brother, Josiah Brown, sued out four writs of entry, returnable at the March term of the supreme judicial court of Massachusetts for Suffolk county, in eighteen hundred and forty-five, against this defendant, Jesse Kingsbury, Milton Gale, and Abbott Lawrence respectively, in which suits the following agreement was made and filed in said cases at the November term of said court for the year eighteen hundred and forty-five:

SUFFOLK, *ss.*

Supreme judicial court, November term, 1845.

GEORGE L. BROWN and JOSIAH BROWN
vs.
ABBOTT LAWRENCE.

Same vs. Jesse Kingsbury.
Same vs. Milton Gale.
Same vs. Fitz Henry Homer.

Writs of entry dated Feb'y 12, 1845. Tenants plead the general issue.

Now at this term the parties agree upon the following facts: That

the land demanded consists of four several lots situate on the north side of North Market street, in Boston, and is part of the same mentioned in the will of William Brown, late of said Boston, deceased, under which the demandants claim title as the estate which the testator purchased of one Mr. Stoddard; but the said William Brown died seised of the demanded premises in fee simple, leaving a will dated April 26, 1815, and a codicil thereto added dated May 30, 1816; both were duly proved, approved, and allowed July 15, 1816; both are to be made part of the case submitted.

Samuel Livermore Brown, named in said will and codicil, was married November 14, 1819, and died January 31, 1831, leaving the demandants his only children and heirs at law. George L. Brown, one of them, was born Feb'y 6, 1821; Josiah Brown, the other, was born Jan'y 5, 1823.

The tenants claim title through mesne conveyances under the quitclaim deeds of William Brown, Zebiah C. Tilden, Sally Brown, and the said Samuel Livermore Brown, dated May 5th, acknowledged, one May 5th, and the other May 17th, and both recorded June 18th, 1824, who were the only children and heirs at law of William Brown, the testator, at his decease; and maintain that the aforesaid grantors were enabled, under and by virtue of the aforesaid will and codicil, to pass, by the aforesaid deeds did pass, all the title to the demanded premises which the testator had at the time of his death.

The demandants maintain, that under and by virtue of said will and codicil, they were entitled, at the death of their father, to the demanded premises in fee simple absolute.

The parties further agree, that if the court should be of opinion that, as matter of law upon the case stated, the demandants have no title to the demanded premises, they are to become nonsuit; but if they have title, then the cases shall be submitted to a jury as to the quantity of land to which the demandants thus have title, and all remaining matters properly incident to the general issue in this form of action.

(Signed) DOW & PRINCE,
Attorneys for demandants.
JNO. PICKERING,
Attorney for tenants.

[The will and codicil, which were made a part of this case, were the same with those herein before at large set forth.]

Under the foregoing agreement the parties to those actions were heard by the court therein named, and, in pursuance of said agreement, a judgment of nonsuit was entered June thirtieth, eighteen hundred and forty-nine, in all the cases embraced in said agreement; an attested copy of the record of said judgment of nonsuit, in the case of the demandant and Josiah Brown against this defendant, was put into the case by the defendant, and was in the words and figures following, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk and Nantucket, ss.

At the supreme judicial court begun and holden at Boston, within the county of Suffolk, and for the counties of Suffolk and Nantucket, on the first Tuesday of March, being the sixth day of said month, in the year of our Lord one thousand eight hundred and forty-nine:

74. George L. Brown and Josiah Brown, of Newbury, in the county of Orange, in the State of Vermont, yeomen, demandants, against Fitz Henry Homer, of said Boston, gentleman, tenant, in a plea of land wherein they demand against the said Fitz Henry Homer a certain piece of land situate in said Boston, and bounded and described as follows: Southerly on North Market street, there measuring twenty-two feet; westerly on lot of land late of Benjamin P. Homer, there measuring fifty-seven feet; northerly on Clinton street, there measuring twenty-two feet; and easterly on land late of Daniel P. Parker, there measuring fifty-seven feet, being the same premises conveyed to Benjamin P. Homer by the city of Boston, by deed dated October 1, 1824, and recorded with the registry of deeds for said county of Suffolk, liber 293, fol. 243, of which the said Fitz Henry unjustly disseised the said demandants, within twenty years last past, as it is said. Whereupon the said demandants say that within twenty years last past they were seised of the said piece of land in their demesne as of fee, and of which the said Fitz Henry disseised the said demandants as aforesaid, to the damage of the said demandants, as they say, the sum of twenty thousand dollars.

This action was commenced in this court at the March term thereof, A. D. eighteen hundred and forty-five, when and where the parties appeared, and it was continued unto the next November term, when and where the parties appeared, and agreed to submit the same to the decision of the court upon an agreed statement of facts.

Thence the same was continued from term to term unto the present term.

And now, after a full hearing, it is ordered by the court, in conformity with the agreement of the parties, that a nonsuit be entered.

It is therefore considered by the court that the said Fitz Henry Homer recover against the said George L. Brown and Josiah Brown costs of suit taxed, sixty-three dollars and ninety-nine cents.

Execution issued September 3, 1849.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss.

I, Geo. C. Wilde, clerk of said supreme judicial court, hereby certify that the foregoing is a true copy as appears of record.

In witness whereof I have hereto set my hand, and affixed the seal of said court, this tenth day of January, A. D. eighteen hundred and fifty-three.

(Signed) GEO. C. WILDE, *Clerk*. [L. S.]

[REC. LXXXVI, D. T., 1853.]—3

The opinion of the supreme judicial court in those cases is reported in the third volume of Cushing's Reports, page three hundred and ninety.

The land put in controversy by the plea of the general issue in this case is part of the same which was demanded in the cases named in said agreement.

Fitz Henry Homer, the defendant in the case at bar, is the same person as by that name is mentioned by said agreement, and owns the same title to the same land.

The demandant denied that the foregoing evidence, relative to said suits in said supreme judicial court, was competent, and objected thereto.

It was further admitted that N. T. Dow, esq., would testify that he was of counsel for the plaintiffs in the suits before mentioned in the supreme judicial court of Massachusetts; that he made the agreed statement of facts with Mr. Pickering, at that time the city solicitor of Boston, and that no pleas were ever actually filed in the case by Mr. Pickering, nor required by Mr. Dow; but the defendant denied the competency of this evidence, and objected thereto.

The defendant requested the honorable court to instruct the jury as follows:

1st. That this action cannot be maintained, because writs of right to recover land situate in the State of Massachusetts have been abolished by its laws.

2d. That this action is barred by the judgment of the supreme judicial court of Massachusetts, which was rendered in a case between the same parties and upon the same cause of action; if that judgment be not a bar to this action, the demandant is estopped by his agreement to submit in that case from prosecuting this action.

3d. That the demandant takes nothing under the will of William Brown, and that he has no title to the demanded premises, or any part thereof.

4th. That the rights and title of the demandant, and those under whom he claims, in and to the demanded premises, or any part thereof, have been barred by the statute of limitations of Massachusetts.

5th. That on the pleadings and facts in this case, all of which herein before appear, the demandant cannot maintain this action.

But the honorable court did refuse then and there to give the said instructions to the jury, in the terms and manner in which the same were prayed, but did instruct the jury as follows:

That the demandant was entitled to a verdict for that part of the demanded premises as to which the tenants had pleaded the general issue; and that as to that part of the demanded premises to which the tenants had put in pleas of non-tenure, their verdict should be for the tenants.

Whereupon the counsel for the defendant did then and there except to the aforesaid refusals and to the instructions and charge of the honorable court; and thereupon the jury returned a verdict for the said demandant, in words following to wit:

3069.

Circuit ct. U. S., Mass. dist., Oct. term, 1852.

GEORGE L. BROWN
vs.
FITZ HENRY HOMER.

On the first issue, being the general issue, the jury find that the said George L. Brown hath more mere right to have an undivided moiety of so much of the demanded premises as is thus described: northerly, by Clinton street, sixteen feet; easterly, by the centre of a brick wall dividing the premises from land formerly of D. P. Parker, deceased, fifteen feet eight inches; southwesterly by land formerly of Savage, now of said Homer, the defendant, twenty-three feet; with the appurtenances to him and his heirs, as he hath above demanded the same—than the said Homer to hold the same as he now holds it, as the said Brown by his aforesaid writ hath above supposed; and that the demandant was seised of the same, as by him in his writ alleged.

On the second and third issues being upon the pleas of general and special non-tenure, the jury find that the said Fitz Henry Homer was not at the date of the writ, has not been since, and is not now seised as of freehold of any part of the land therein described, as the said Brown by his aforesaid writ hath above supposed.

(Signed) LUKE FAY, *Foreman*.

A true copy. Attest: ISAAC O. BARNES, *Clerk*.

And, inasmuch as the matters referred to in the several refusals and instructions of the honorable court so objected to do not appear by the record aforesaid, the counsel on the part of said defendant prayed the honorable court to allow and seal this bill of exceptions, containing the several matters proved and given in evidence, and the charge of his honor the judge thereupon and other exceptions thereto; all which being found to be true, the same are allowed.

In witness whereof I have hereunto set my hand and seal.

P. SPRAGUE, [SEAL.]
District judge U. S. c. ct.

UNITED STATES OF AMERICA,
Massachusetts district, ss.

I, Henry W. Fuller, clerk of the circuit court of the United States, for the first circuit, Massachusetts district, do hereby certify, that the foregoing is a true copy of the record of the case of George L. Brown versus Fitz Henry Homer.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of the said court at Boston, this twenty-second [SEAL.] day of March, A. D. 1853, and in the seventy-seventh year of the independence of the United States of America.

H. W. FULLER, *Clerk*.